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September 26, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Preemption of Restrictions on Placement of Antennas on Rental and Other Property Not Within the Exclusive Control of a Person With an Ownership Interest, Further Notice of Proposed Rulemaking (FCC 96-328) to Implement Section 207 of The Telecommunications Act of 1996.

Dear Mr. Caton:

This is in response to the FCC's Report and Further Notice of Proposed Rulemaking of August 6, 1996 which requests comments "with regard to placement of antennas on common areas or rental properties, property not within the exclusive control of a person with an ownership interest, where a community association or a landlord is legally responsible for maintenance and repair and can be liable for failure to perform its duties property." Enclosed are six (6) copies of this letter, in addition to the original.

The Apartment and Office Building Association of Metropolitan Washington, D.C., Incorporated (AOBA), represents the interests of owners and managers of residential rental apartment and commercial office buildings in the greater Washington D.C. area (the District of Columbia, Suburban Maryland and Northern Virginia). In total, our membership owns or manages nearly 200,000 apartment units and over 100 million square feet of commercial office space in the Washington D.C. region.

Any action to (1) grant to individual persons or businesses who do not have an ownership interest in the property they rent the right to place antenna on that property, or (2) require any property owner to provide upon tenant demand community-based signal installations and/or (3) mandate a uniform compensation system for property owners not reflecting "just compensation", would not only affect adversely the conduct of our members' businesses without justification but would constitute an impermissible "taking" of private property in violation of the Fifth Amendment to the United States Constitution.

It is the position of AOBA that the FCC, for substantial business reasons stated herein, should not extend federal regulations implementing Section 297 of the Federal Telecommunications Act of 1996 to those circumstances under which the tenant does not have exclusive use or control of, and direct ownership interest in the properties where an antenna, satellite dish, etc. is to be located, installed, utilized, and maintained. Among the number of substantial business reasons for not requiring landlords to grant tenants the right to locate, install, use, and maintain antennas and satellite dishes and the like upon properties for which they have no ownership interests are such factors as safety, security, aesthetics, liability, insurance, and property value considerations.

Each of these considerations must be reviewed and taken into account by a landlord on a day-to-day management basis. Given the economic and legal importance of those considerations to multi-family residential rental building owners and managers, no responsible regulatory body reasonably can ignore those considerations in attempting to mandate access and/or establish a uniform compensation system for providing either voluntary or involuntary (mandatory) access.

With respect to the legal appropriatness of mandating access and/or establishing a uniform compensation system for voluntary or involuntary access, it is our belief that such a regulatory scheme would be violative of existing federal takings case law whenever such mandatory access and/or compensation system might involve individuals -- tenants or television and tlelcommunications service providers -- who do not have exclusive use or control of a property and/or do not have an ownership interest in the properties affected by such access and/or compensation system. In Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 473-74, 95 L. Ed., 2nd 472, 107 S. Ct. 1232 (1987), the Court enunciated the following four factors or tests constituting a per se rule for determining a non-possessory taking:

(1) the character of the government regulation (e.g. a regulation that compels the property owner to suffer a "physical invasion" of his property is a taking per Loretto),

(2) whether the regulation has deprived the property owner of all economically viable uses of his property,

(3) whether the regulation has deprived the owner of his reasonable investment-backed expectations, and

(4) whether the regulation substantially advances a legitimate state interest.

While federal takings case law with regard to television and/or telecommunications access to multi-family residential rental apartment or commercial office buildings is scanty, in our opinion, it is clear cut and dispositive. The controlling U.S. Supreme Court cases which are relevant to the rule-making under FCC 96-328 are Loretto and Penn Central. In Loretto v. TelePrompter Manhattan CATV Corporation, 458 U.S. 419, 423, 426, and 441 (1982), the Court held that a New York state law requiring landlords to allow cable television service providers to install their wires and equipment on the landlords' property and prohibiting such landlords from

demanding fees beyond those which a state commission determined to be "reasonable" (and which commission determined was to be a one-time $1 fee) violated the just compensation clause of the Fifth Amendment to the U.S. Constitution. The Court also noted :

(1) that "a permanent physical occupation authorized by government is a taking without regard to the public interests it may serve." ..., and that "[i]n such a case, the 'character of the governmental action' not only is an important factor in resolving whether the action works a taking but also is determinative." Id. at 426.

(2) that the Penn Central decision (Penn Central Transportation Co. V. New York City, 438 U.S. 124, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978))"does not repudiate the [per se] rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors a court might ordinarily examine." Id. At 432.

(3) that the action is a taking even if a private party, rather than the state is the occupying party. Id. at 432, n. 9., and

(4) The extent of the economic impact is relevant only in determining compensation, not the issue of occupancy. Id. at 435 and 437.

In the FCC's Report No. DC 96-78 of August 6, 1996 by which the Commission adopted "Over-The-Air Reception Device Rules," one of the commenters -- SBCA (see Para. 62 at page 38 and Para. 64 at page 39) -- cites dicta in Loretto (n. 19 at 440) which allegedly states "that if the law (New York State statute) were written in a different manner that required ' cable installation if a tenant so desires, the statute might present a different question .... ' " First, it should be noted that the quotation is a footnote and constitutes dicta on the Court's part which does not rise to the standard of case law or precedent. However, the quotation presented by SBCA also is incomplete and subject to a far different interpretation when presented in its substantive entirety and context. The correct quote is as follows: [i]f ... [the New York State statute section] required landlords to provide cable installation if a tenant so desires, the statute might present a different question *from the question before us, since the landlord would own the installation....*"[1]. The proposition of a different question to be decided by the court is far afield from the proposition of a different conclusion on the part of the court as might be implied by the SBCA comment. Indeed, that footnote, in reality, is the Court majority's rebuttal to the minority's argument at 458 US 449.

Likewise, the comment attributed to DIRECTV (see Para. 62 at page 38) "that the Fifth Amendment is not implicated by a rule preempting private antenna restrictions because other regulations of the landlord-tenant relationship, e.g. a regulation requiring a landlord to install sprinkler systems, have not been deemed a taking" demonstrates (1) a misunderstanding of a state's right to exercise its police powers to protect the public health, morals, and safety (e.g. the right of a state to establish a uniform state-wide building code and / or fire protection code to

[1] Italics added for emphasis

protect public health and safety of tenants and (2) a misreading of takings case law as enunciated in Loretto.

As the Court specifically stated in Loretto ..."states have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails when the government does not authorize the permanent occupation of the landlord's property by a third party... and the state's power to require landlords to comply with building codes and provide utility connections, mail-boxes, smoke detectors, fire extinguishers and the like in the common area of the building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building, they will be analyzed under the multi-factor inquiry [per se rule] generally applicable to non-possessory government activity." Id. at 440.

The FCC proposals, however, would lead to a permanent physical (possessory) occupation of a landlord's buildings by government action. But, even if they did not, the fact remains that even under the pre se rule enunciated by the Court in Keystone, the FCC proposals would still meet the "taking" tests of "the character of the governmental regulation" and "whether the regulation substantially advances a legitimate state interest," according to the findings posited by the Court in Loretto. Id. at 426 and 432. To the best of our knowledge, the provision of television or telecommunications services to tenants never has been recognized by the Court to be a matter of public health and safety or morals.

While conceding that any regulation issued under the FCC proposal is unlikely to violate the second test under Keystone (i.e. depriving the property owner of all economically viable uses of his property), we would contend that any regulation (1) mandating tenant access and (2) restricting landlord compensation, with or without mandated access, would violate the third "takings" test by depriving landlords of their reasonable investment-backed expectations. However, we also would note that the FCC's proposals would constitute a possessory taking of "such a unique character" that they would be subject to factors other than the per se rule. (See Loretto at 432 and 440).

Another case of interest, but not dispositive, is Florida Power (see Federal Communications Commission v. Florida Power Corporation., 480 U.S. 245, 248, and 254 (1987), In Florida Power the Court held that a federal law which regulated the rates a public utility charged cable television service providers for using the utility's poles did not violate the just compensation clause. However, the Court distinguished Florida Power from Loretto in that (in Florida Power) there was no issue of compelled occupancy. Id. at 251-252.

Two cases decided by the U.S. Circuit Court System also are of interest and instructive. In Multi-Channel TV Cable Co., the U.S. Court of Appeals for the 4th Circuit, upheld a Virginia statute which barred landlords from demanding or accepting compensation from television service providers for allowing access to landlords' multi-family housing units. (See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.)., 65 F. 3d 1113 (4th Cir. 1995). However, the lower court distinguished that case from Loretto in that (in Multi-Channel Cable TV Co.) there was no issue of compelled occupancy, and the prohibition on landlord compensation was restricted to compensation "merely for providing 'access' to their tenants" and

did not prohibit compensation for occupancy and use of the landlords' property or for landlord services to tenants or television service providers. Id. at 1123.

With respect to Bell Atlantic (Para. 65 at page 40 of the FCC Report) concerning an order of the FCC which allowed competitive access providers to locate and maintain their connecting transmission equipment in local exchange carriers offices (see Bell Atlantic Telephone Companies v. FCC, 24 F. 3d 1441 (D.C. Cir. 1994), the U.S. Court of Appeals for the D.C. Circuit raised the question as to whether the FCC had that authority under Section 201 (a) of the Federal Telecommunications Act of 1934 (47 U.S.C. 20 et seq.) and noted that "[i]f the statute vests the Commission to confer an exclusive right of physical occupation, exercise of the statutory power would seem necessarily to 'take' property, regardless of the public interests served in a particular case." It then stated that "[t]he [Commission's] order of physical co-location, therefore, must fall unless any fair reading of Section 201 (a) would discern the requisite authority. The Commission's power to order 'physical connections,' undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LEC's (local exchange companies) central offices." Id.at 1446. Further, the court noted that [t]he Commission's decision to grant CAPS (competitive access providers) the right to exclusive use of a portion of the petitioners (Bell Atlantic) central offices directly implicates the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation' authorized by government is a taking without regard to the public interests that it may serve". Id. at 1445 citing Loretto at 426. We would suggest that under Section 297 of the Federal Telecommunications Act of 1996, the FCC lacks the authority to implement the regulatory requirements implied by FCC 96-328.

There also has been state level administrative and constitutional review of proposed or existing state legislation with regard to television access to multi-family housing. The State of Florida once provided by statute a requirement that landlords of multi-family residential rental housing could not deny access to any available franchised or licensed cable television service. Further, the landlord could not require any tenant or cable service to pay anything of value in order to obtain or provide such service, except for those charges normally paid for like services by residents of, or providers of such services to, single family homes within the same franchised or licensed area except for installation charges as may be agreed to between such residents and the provider of such services. That law was found to be unconstitutional, but an identical enactment applicable to condominiums is still in effect. (See Florida Statutes Annotated, Section 718.1232.)

Recently the Attorney General of Maryland, in issuing an advisory opinion on the constitutionality of legislation proposed at the 1996 session of the Maryland General Assembly, opined that a proposed law which "requires the owner [of a multifamily property] to ... [retain] ... [existing] wires and equipment on a building violates the Just Compensation Clause of the Federal Constitution." The matter at hand was a General Assembly bill which allowed multi-family residential tenants to continue subscribing to a cable television service even if the landlord selected a new service. The Attorney General also cited as a constitutional barrier the fact that "[t] he bill

does not expressly recognize the right of the landlord to be compensated by the original service [provider] for the physical occupation of the premises."[2]

We also want to call your attention to the rapid growth over the past decade in consolidation of ownerships in the multi-family residential rental housing industry whether those properties are acquired under privately-owned or publicly-traded (i.e. Real Estate Investment Trusts) ownerships.

With respect to Real Estate Investment Trusts (REITS), revenue sources and cash flows involved in the operations of multi-family residential housing are particularly critical and sensitive. As with any publicly traded entity, these matters -- revenue sources and cash flows -- are paramount to the stock market's perception of a security's financial well-being. Accordingly, REITS must maximize their Funds From Operations (FFO) and look for potential revenue sources to enhance the return to their shareholders. Residential REITS, as well as other multi-family housing providers, offer business opportunities for television, telephone and other telecommunications providers who are willing to share the revenues which can be attributed to the provision of bulk services to multi-family rental housing buildings in return for the landlords providing access to, occupation and use of their properties, and advertising, promotion, and similar services to service providers and tenants. Consequently, neither the owners of privately-owned nor publicly-traded multi-family residential rental housing should be penalized by being barred from capitalizing on the market opportunities which occur as a result of their prudent and investment-based expectations.

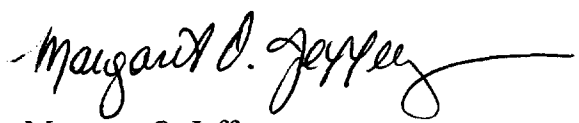
Another significant factor affecting the financial stability of REITS is the IRS guidelines used for testing "good" versus "bad" REIT income. Under these guidelines, REITS can derive only five percent of their gross income from sources determined by the IRS as "bad" income. Recently, an IRS ruling has allowed REITS, under certain circumstances, to realize income from shared cable television revenue. However, under the IRS guidelines, when statutory or regulatory restrictions are imposed on the ability of property owners/managers to realize income from any revenue source, such income falls within the test for "bad" income subject to the five percent limitation referenced above.

It also is widely recognized that because of federal government downsizing -- which will continue at least over the current decade -- as well as the general slowing of both the local and national economies, there is a general surplus of units available in the existing multi-family residential housing market in the D.C. area; consequently, competition in the local multi-family housing market is very intense. A major factor in a landlord's ability to attract new and retain current tenants is the landlord's ability to provide a number of low-cost, attractive amenities, including TV, telephone and other telecommunications services.

[2] Letter of March 25, 1996 to Senator Martin G. Madden

Given the very real business-related concerns as well as the constitutional barriers inherent in the regulation of television and other telecommunication for multifamily residential rental buildings, the FCC should forego the proposed rulemaking and instead rely upon natural market forces in this highly competitive industry to assure a low-cost and broad range of telecommunications services.

Sincerely,



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March 25, 1996

The Honorable Martin G. Madden
402B Senate Office Building
Annapolis, Maryland 21401-1991

Dear Senator Madden:

This is in response to your inquiry on Senate Bill 749, a bill to allow residential tenants to continue subscribing to a cable television service even if the landlord selects a new service. In our conversation on Friday, you asked if the bill would constitute a taking of property without just compensation in violation of the Fifth Amendment. As the bill does not expressly recognize the right of the landlord to be compensated by the original service for the physical occupation of the premises, it is my view that there would be such a constitutional objection.

Senate Bill 749 amends the Commercial Law Article to add a new §14-1315. Subsection (b) of this new section would provide, as follows:

> "A subscriber that resides in a multiple dwelling unit of five or more units that is situated on one parcel of property for which multichannel video programming service has been provided may continue to receive that multichannel video programming service notwithstanding any agreement to the contrary between a different multichannel video programming distributor and the owner of the property."

The bill would take effect October 1, 1996, Sec. 3, and would have no application to agreements between distributors and property owners entered on or before September 30, 1996. Sec. 2.

As drafted, the bill applies to cable television services. Using the available technology, such services typically attach wires and other equipment to a structure which is to receive the service. However, in the case of residential tenants, the owner of the premises to which the wires and equipment are attached is not the same party as the recipient of the service. Thus, for the tenant to continue to receive the service, the wires and equipment which transmit the service must continue to be maintained on the owner's building. The issue is whether a law which requires the owner to maintain such wires and equipment on the building against his will violates the Just Compensation Clause of the Federal Constitution.

The Fifth Amendment of the Federal Constitution provides, in part, that private property shall not be taken for public use without just compensation. This prohibition is binding on the states. In interpreting the Just Compensation Clause, the Supreme Court has held that a state law which required landlords to allow cable television operators to place their wires and equipment on the landlord's property to serve the operator's subscribers violated this clause in absence of reasonable compensation. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 423, 426 and 441 (1982). The Court observed that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Id. at 626. This is true even if a private party, rather than the State, is the occupying party. Id. at 632, n. 9. Moreover, the extent of the economic impact is relevant only in determining compensation, not the issue of occupancy. Id. at 435 and 437.

In a subsequent case, the Supreme Court held that a federal law which regulated the rates which a public utility charged cable television operators which used the utility's poles did not violate the Just Compensation Clause. Federal Communications Commission v. Florida Power Corp., 480 U.S. 245, 248 and 254 (1987). The Court distinguished the Loretto case on the grounds that there was no issue of compelled occupancy. Id. at 251-252. Like the law at issue in the Loretto case, Senate Bill 749 compels landlords to allow their property to be physically occupied by the wires and equipment of cable television operators with whom they do not wish to do business. In the absence of any recognition that the landlord is entitled to reasonable compensation for this use, it follows that Senate Bill 749 violates the Just Compensation Clause of the Fifth Amendment.

Sincerely,

Richard E. Israel

Richard E. Israel
Assistant Attorney General

REI:maa